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SUPREME COURT OF THE UNITED STATES.

W. A. MARSHALL & COMPANY, INC., Petitioner, *vs.* Steamship *President Arthur*, her engines, boilers, etc., AMERICAN PALESTINE LINE, INC., Claimant.	October Term 1928. No. 272.

BRIEF FOR RESPONDENT.

I. *Jurisdiction.*

This case comes here on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, filed, pursuant to the provisions of the United States Code, Title 28, Section 347 (a), on July 14, 1928, and granted on October 15, 1928.

II. *Opinions.*

The writ seeks to review a decree of the Circuit Court of Appeals for the Second Circuit (*R.* 37) which affirmed a decree dismissing the libel entered October 10, 1927, in the United States District Court for the Southern District of New York. (*R.* 27.)

The opinion of the District Court by Judge Thacher is reported as *The President Arthur*, 22 F. (2d) 584, and appears at pages 25-27 of the Record.

The opinion of the Circuit Court of Appeals, Judge Learned Hand dissenting, is reported as *The President Arthur*, 25 F. (2d) 648, and the opinions are to be found at pages 30-37 of the Record.

III. *Statement of Facts.*

During February, 1925, negotiations were had between the petitioner, hereinafter called the Coal Company, and the American Palestine Line, Inc., hereinafter called the shipowner—both parties being corporations of the State of New York—for the sale of coal by the Coal Company to the Shipowner for use of the steamship *President Arthur*.

As a result of these negotiations two contracts for the sale of coal were made between the parties, one on February 18, 1925, Libelant's Exhibit 1, (*R.* 14-16), and one on March 4, 1925, Libelant's Exhibit 3. (*R.* 16-18.)

The reasons for the terms of these contracts, which were most unusual in connection with the supply of coal to a steamer are disclosed by the preliminary negotiations. The Shipowner requested a credit for a period of longer duration than the Coal Company customarily granted. (*R.* 9, 12.) That request led to an investigation of the Shipowner's credit status by the Credit Department of the Coal Company. It was found not to be satisfactory. (*R.* 9, 12, 13.) *In fact, the Shipowner was found not to be financially responsible.* (*R.* 12.)

Consequently the Coal Company decided to depart from its usual custom as to credit allowances to Steamship Companies and demand a formal contract providing that the coal should be paid for at the time of the delivery of the coal, by trade acceptances endorsed by three parties satisfactory to the Coal Company (*R.* 9), in order that the Coal

Company might have responsible parties to whom to look for payment and in order that it might be able to secure a prompt payment by negotiating the acceptances at a bank. (*R.* 10-11.) Three suggested endorsers, to-wit, J. W. Gottlieb, Jacob Wacht and Jacob Strahl, were investigated and proved acceptable to the Coal Company. (*R.* 11.) In fact, it was distinctly understood and agreed that these endorsers would be the primary obligors. (*R.* 22, 24.)

In an affidavit made in the State Court action against these endorsers, commenced after this suit was started, it is stated that the Coal Company desired payment by negotiable paper at the time of the delivery of the coal "in order to get the money at any time that they wanted it,—in fact, to discount that paper * * * we wanted additional security as we were not satisfied with the credit of the American Palestine Line"; (*R.* 9) that the offer to sell was only on condition that the trade acceptances to be given in payment would be signed by three indorsers acceptable to the plaintiff; that the indorsements were being given as part of the consideration; that the petitioner was not relying on the credit of the American Palestine Line, Inc., but that he was demanding the indorsements of these individuals as an absolute prerequisite to the sale; (*R.* 24) that "Without the consideration of such indorsements the plaintiffs would never have sold the coal to American Palestine Line." (*R.* 22.)

Sanford, Manager of the Tidewater Department of the Coal Company, who conducted the negotiations prior to the signing of the contract, was of opinion that there would be a maritime lien in the ordinary case of sale of coal to a ship (*R.* 10). But nothing was said of the lien in the course of the instant transaction.

The negotiations ended by a letter from the Coal Company which substantially embodied the terms of the proposed contract, *Claimant's Exhibit A* (*R.* 18), and as a result the two contracts, which covered the whole situation, providing the mines from which the coal should come, for inspection and for payment by trade acceptances, above mentioned were made.

The reason there were two contracts instead of one was that the shipowner found it would need more coal than originally estimated. (*R.* 21.)

The two contracts were, therefore, identic except as to the amounts of coal to be furnished and as to the dates.

Each agreement contains the following provisions with reference to the payment of the purchase price of the coal. (*R.* 14, 16.)

> "The buyer will pay for the said coal as follows:
>
> (1) By delivering to the Seller a trade acceptance drawn by it in favor of the Seller, dated the date of the delivery of the coal, due March 10, 1925, covering railroad freight of $2.79 a gross ton, which acceptance is to be endorsed by Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> (2) A trade acceptance drawn by the Buyer in favor of the Seller, dated on the same day, due May 8, 1925, covering the balance of the purchase price, to wit: $2.31 a gross ton, representing the coal, harbor barge freight and insurance on coal while in barges, which acceptance is also to be endorsed by the said Jacob Wacht, Jacob S. Strahl and Joseph W. Gottlieb.
>
> *The entire contract between the parties is stated above and there is no outside condition, warranty, agreement, or understanding.* Certificate of weights according to railroad bill of lading.

Witness the signatures of the respective parties hereto." (Italics ours.)

On each of the said agreements, below the signatures of the parties and above the signatures of the persons named as endorsers of the acceptances to be given by the Purchaser, there appears the following:

> "In consideration of the execution of the foregoing contract, and the delivery of said coal by the Seller to the Buyer, and in consideration of One Dollar ($1.00) paid to each of the undersigned, the receipt of which is hereby acknowledged, we jointly and severally agree to endorse the said trade acceptances described in the foregoing contract between the Seller and the Buyer."

According to the libel, 4,151 tons and 12 cwt. of coal were furnished and the total purchase price as claimed in the libel was $21,173.16.

For this amount two trade acceptances were given, one for $11,790.50, and one for $9,382.62.

The first trade acceptance for $11,790.50 was duly met.

The second trade acceptance, which was similar to the first, save as to due date and amount, is in the following form, (*R.* 19):

> "$9,382.62 New York, March 6th, 1925.
>
> May 8th, 1925, Pay to the order of W. A. Marshall & Company nine thousand three hundred and eighty-two and 62/100 dollars. Value received and charge the same to account of
>
> W. A. Marshall & Company. David L. Morrison, **Treas.**
>
> To American Palestine Line, Inc., No. 1493 Broadway, New York City, N. Y."

The following notice appears on the face of the trade acceptance: "Accepted—March 6th, 1925. Payable at National City Bank, 57th Street office. American Palestine Line, Inc., by James Wacht, Treasurer." On the reverse side of the trade acceptance appear the following names in the order given: "Jacob Wacht, Jos. W. Gottlieb, Jacob S. Strahl, W. A. Marshall & Co., by David L. Morrison, Treasurer."

It is for $9,382.62, with interest from March 6, 1925, the amount of the second trade acceptance which has not been met,—that the libelant is claiming a maritime lien against the *President Arthur* in this case.

IV. *The Pleadings.*

The libel in this case was in the conventional form, claiming a maritime lien of $9,382.62, under the Merchant Marine Act of June 5, 1920. (*R.* 1-3).

The amended answer, on which the case was tried, denies that the amount claimed was due owing to the fact that by pleading payment the Shipowner had delivered to the libelant the two trade acceptances endorsed by three parties as required by the contract; and that on delivery of such trade acceptances, the claims of plaintiff were paid and extinguished and any maritime lien had or claimed to be had by the plaintiff was extinguished and terminated. (*R.* 3.)

The existence of a maritime lien was denied and, by way of further answer, a claim was set up that the coal did not come up to the warranties of the contract. (*R.* 4-5.)

This branch of the defense has not been pressed and may, therefore, be disregarded so far as the matters before this Court are concerned.

In the seventh article of the answer there was a further answer setting up a pending suit in the Supreme Court, New York County, against the three endorsers on the trade acceptances, which constituted an election to treat the acceptances as payment.

For the litigation between the parties has not been limited to the libel now before the Court.

The present suit was commenced on May 11, 1925, when the libel was filed against the steamship *President Arthur*. (*R.* 1.)

On June 18, 1925, the Coal Company commenced an action in the Supreme Court of New York County against Gottlieb, Wacht and Strahl as endorsers of the second trade acceptance on the ground that their endorsements had been given as primary obligors for the purchase price of the coal and were an essential prerequisite to the sale. (*R.* 5, 22.) The American Palestine Line was not sued in this action (*R.* 20), obviously because the Coal Company from the beginning, owing to the financial condition of the American Palestine Line, looked only to the endorsers as the real contracting parties.

These facts are shown by affidavits of the Manager of the Tide Water Department of the Coal Company, Mr. Sanford (*R.* 20-23), and of George W. Hinckley, its counsel (*R.* 23-24), which were attached to a motion to the Supreme Court of New York County for summary judgment against the said endorsers. (*R.* 12.)

A motion was made in this State Court action by the plaintiffs, the Coal Company, for a summary judgment on the ground that the three endorser defendants did not have any defense to the action on the trade acceptances. (*R.* 22.)

In an affidavit in support of this motion Mr. Sandford, Manager of the Coal Company, said, (*R.* 22):

> "The claim that the defendants were accommodation endorsers for the benefit of W. A. Marshall and Co. is refuted by the terms of the offer and of the contracts and by their own signatures upon the contracts. Instead of being accommodation endorsers for the benefit of W. A. Marshall and Co., they are in fact straight endorsers, so far as W. A. Marshall and Co. is concerned, for without the consideration of such endorsements, the plaintiff would never have sold the coal to American Palestine Line, Inc."

Thus it is shown that Marshall & Company regarded the three endorsers as the primary obligors and that it was on their credit entirely that the sale was made. They were in the same position as if they had given their own notes instead of endorsing the trade acceptances.

This position is sustained further by the affidavit of Mr. Hinckley, of counsel for the Coal Company, who filed an affidavit in the same motion for summary judgment, in which he says (*R.* 24):

> "Were the defendants accommodation endorsers for W. A. Marshall and Co.? This question of fact is conclusively answered by the affidavit of Mr. Sandford and the annexed exhibits consisting of the offer to sell the coal and the two contracts therefor actually signed. These documents show that W. A. Marshall and Co. offered to sell the coal to the American-Palestine Line, Inc., only on condition that the trade acceptances to be given in payment would be signed by three endorsers acceptable to the plaintiff. The contracts themselves similar in form and for quantities of coal making up the aggregate, show exactly the basis upon which the defendants signed the trade acceptance here sued on. They were straight endorsers so far as W. A. Marshall and Co.

is concerned. They gave their endorsements as part of the consideration moving from American-Palestine Line, Inc. to W. A. Marshall and Co. for the purchase of the coal in question. The plaintiff's offer shows that the plaintiff did not rely solely on the credit of the American-Palestine Line, Inc., and that the endorsement of these individual defendants was an essential prerequisite for the purchase of this coal by their corporation. The contract itself demonstrates that these individual defendants understood completely the significance of their endorsements."

The claim for summary judgment was not allowed, and, at the time of the trial of this case, counsel for the Coal Company admitted that the action in the New York Supreme Court was pending. (*R.* 12.) So far as is known to the Shipowner, it is still pending.

The effect of this action in the State Court was not discussed in the opinions below.

V. *Basis of decisions below.*

The case was tried before Judge Thacher on June 3, 1927.

On September 13, 1927, an opinion was rendered by Judge Thacher holding that the contract above set forth was conclusive between the parties, and that in the face of the agreement no maritime lien could have arisen because the coal was to be paid for on delivery, and that, on the other hand, if a maritime lien had arisen, it could not survive payment in the form for which the parties contracted, that is, by the delivery of the acceptance. He found as a fact that it was entirely clear "*that the libellant did not rely on the credit of the ship*". The libel was, therefore,

dismissed and a final decree dismissing the libel entered on October 10, 1927. (*R.* 27-28.)

An appeal was taken on November 11, 1927 (*R.* 28), and the assignments of error, pointed to the rulings of Judge Thacher above mentioned, appear in this record at pages 28-29.

The case was argued in the Circuit Court of Appeals on March 14, 1928, and on April 9, 1928, a decision was handed down affirming the decision below. The opinion by Judge Manton, in which Judge Augustus N. Hand concurred, sustained Judge Thacher both on the point that there was not any lien and on the point that if there was a lien the delivery of the trade acceptance had extinguished it. (*R.* 32-33.)

Judge Learned Hand dissented on the ground that, as the Shipowner was a party to the trade acceptance it could not be claimed that payment had been made by the delivery of the acceptance because he still remained liable on the acceptance and had never paid it, and, further, on the ground that the contract, conclusive as it was in its terms, could not be considered to have displaced the presumptive maritime lien arising under the provisions of the Merchant Marine Act of June 5, 1920, so as to be construed as a waiver of the lien under the provisions of that Act.

VI. *The Question Presented.*

The real question presented to this Court herein is whether the evidence supports the concurrent findings of fact of the Courts below that the parties by entering into an exclusive contract as to the terms on which the coal was to be furnished to the *President Arthur*, waived any right to a maritime lien against the steamship.

There is a subsidiary question also involved, namely, whether if such a lien could have existed in spite of the contract and the surrounding circumstances it was extinguished when payment was made in accordance with the terms of the contract by the giving of the trade acceptances, on which the endorsers were understood to be the primary obligors.

It was to these questions that the only oral evidence offered in the case, which was on behalf of the Coal Company, and also the documentary evidence in the case, was pointed.

VII. *The Statutes Involved.*

The only statutes involved in this case are ss. 971 and 974 of title 46 of the United States Code. Act of June 23, 1910, c. 373, 36 Stat. 604 as amended by Act of June 5, 1920, c. 250, 41 Stat. 1005, commonly called the Merchant Marine Acts.

Section 971 of title 46 provides:

> "*Persons entitled to lien.* Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

Section 974 of title 46 provides:

> "*Waiver of right to lien.* Nothing in this chapter shall be construed to prevent the furnisher of re-

pairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States."

Summary of Argument.

The parties in this case were in a zone of free contract. The only question, therefore, was the question of fact: What was their intention?

It seems to us that their intention was to make a contract looking entirely to the credit of the named endorsers as principal obligors—a contract as much outside of any maritime lien security as if the coal had been bought on the same contract for an apartment house.

We contend

I. That, under the decisions of this Court,* this question is concluded in the shipowner's favor by the concurrent findings of the Courts below: that by a special written contract for the sale of coal—made by its express terms the exclusive arrangement between the parties—and based

* The rule as to the acceptance of concurrent findings of lower courts was applied by this Court to a similar finding in an analogous case. *Piedmont Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 1, 13.

solely on the credit of three outside parties, the Coal Company had waived the right to a lien it might otherwise have had, under the statute above quoted, against *President Arthur*, if the coal had been furnished to her without the special contract;

II. That, as under the special contract the parties had agreed that the trade acceptances should be payment for the coal and as these acceptances were given by the shipowner and accepted by the Coal Company in payment, the contract had been fully performed and discharged, and the relationship between the parties which had sprung out of the contract had ended, for in accordance with a long line of decisions in this Court negotiable paper is payment when it is so agreed between the parties;

III. That hence the relationship could not be resurrected in order to make a foundation for a maritime lien as a security for the payment of the purchase price of the coal;

IV. That the Courts below gave full effect to the lien provisions of the Merchant Marine Act, that no question of the construction of that Act is here presented and that this seems to be admitted by the petitioner;

V. That the decisions of this Court cited by the respondent as in conflict with the decision below are not in conflict but are in harmony, and

VI. That, furthermore, the Courts below applied precisely the same principles as have been repeatedly applied to similar situations by members of this Court sitting on Circuit, as they are still applied by the lower Federal Courts

today: By Chief Justice Taney, in *Phelps* v. *The Camilla*, Taney 400, 19 Fed. Cas. 441, 444; by Mr. Justice Miller, in *Taylor* v. *The Commonwealth*, 14 Am. Law Reg. (U. S.) 86, 23 Fed. Cas. 756; by Mr. Justice Thompson in *Murray* v. *Lazarus*, 1 Paine 572, 17 Fed. Cas. 1049; by Mr. Justice Woodbury, in *Leland* v. *Medora*, 2 Woods. v. M. 92, 15 Fed. Cas. 298, 301, and by Mr. Justice Story in *The Nestor*, 1 Sumner 73, 18 Fed. Cas. 9.

FIRST POINT.

THE ONLY QUESTION PRESENTED IN THIS CASE IS A QUESTION OF FACT WHICH WAS DETERMINED IN FAVOR OF THE RESPONDENT BY THE CONCURRENT FINDINGS OF FACT OF BOTH COURTS BELOW, NAMELY, THAT ANY MARITIME LIEN WHICH MIGHT HAVE ARISEN IN ORDINARY COURSE ON THE "PRESIDENT ARTHUR" BY THE FURNISHING OF THE COAL HAD BEEN WAIVED OWING TO THE CONTRACT BETWEEN THE PARTIES WHICH PROVIDED FOR OTHER SECURITY AND WHICH BY ITS EXPRESS PROVISIONS WAS MADE EXCLUSIVE OF ANY OTHER ARRANGEMENT BETWEEN THEM.

As the petition for certiorari does not state the real issue in this case and, as the brief for the petitioner seems to be subject to the same criticism, we have thought it advisable at the beginning of our argument to show this Court that the only question is one of fact, dependable in part on the oral evidence of a witness called by the Coal Company before the District Judge, whose finding, which was contrary to the Coal Company's contentions, was affirmed by the Circuit Court of Appeals.

If the coal had been furnished to the *President Arthur* on order of her owner at New York without any other cir-

cumstances whatever, the Coal Company would have been entitled to a lien under the provisions of Section 971, Title 46 of the Code above quoted.

Under such circumstances a contract implied in fact would have arisen which would have had for its security the lien under the Statute.

What actually happened, however, was very different. After the long negotiations described above, a contract was entered into for the sale of the coal which provided that it should be paid for by trade acceptances containing the endorsements of three persons satisfactory to the Coal Company.

The contracts, moreover, contained the following provision:

> "The entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding" (*R.* 14, 17).

This provision denotes by its terms an express exclusion of the possibility of any contract implied in fact, on which a claim for a lien might have been based, or any other kind of contract than that of which it formed one of the principal parts.

There is, therefore, in this case an express waiver of the lien in accordance with the provisions of Section 974 of Title 46 providing for the waiver of the right to a lien, which says that such a waiver may be effected "by agreement or otherwise."

So not only by the obvious intention of the parties in their negotiations and in their subsequent attitude, but also by the express terms of the contract the basis of claiming that there was a maritime lien on the *President Arthur* was excluded.

Judge Thacher said:

> "It is entirely clear, I think, that the libelant did not rely on the credit of the ship." (*R.* 27.)

In reading this finding it is to be remembered that Judge Thacher had before him the evidence introduced by the Coal Company together with such documentary evidence as was introduced on behalf of the Shipowner during the examination of the Coal Company's only witness.

Therefore, without any evidence offered on behalf of the Shipowner, construing the evidence of the Coal Company alone, the Court found that it was clear that the Coal Company did not rely on the credit of the ship.

This fact was amply supported by the affidavit of Mr. Sandford, Manager of the Coal Company, and Mr. Hinckley, counsel (*R.* 24), extracts from which have been set forth above in the statement.

To this finding the Coal Company assigned error, Assignments of Error, Nos. 2-5, R. 29.

In the opinion of the Circuit Court of Appeals, Judge Manton said:

> "It is significant that the agreement provides that the indorsements were made by these individuals as part of the consideration of the sale of the coal, and it was sworn in an affidavit that, without the consideration of such indorsements, the appellant would never have sold the coal to the American-Palestine Line. There was 'no outside condition, warranty, agreement or understanding.' Thus it appears that the credit of the ship was not accepted by the appellant, but by the contract of the parties, trade acceptances with three indorsers were insisted upon, and everything for which the appellant had contracted was given in payment" (*R.* 32).

The findings below are of the kind held by this Court to be conclusive.

In the case of *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, coal for the fishing season had been furnished by a Coal Company to the owner of a fleet of vessels and it had been by the owner distributed among the vessels at its own convenience.

It was held by the Circuit Court of Appeals in that case and by this Court that this did not give rise to a statutory lien because the coal was not furnished to the vessel by the Coal Company but was furnished to their owner and so did not fall within the terms of the Lien Statute of 1910.

A further contention in the case, however, was that there had been an agreement that in consideration of the Piedmont Company's furnishing the coal, it would have maritime liens on the vessels which consumed the coal, and it was contended that this gave rise to a non-statutory lien which entitled the Coal Company to a maritime lien on which it could recover *in rem* against the several vessels for the amount of coal each had consumed.

The lower Courts had held that there was not any such agreement, and this Court said, in affirming the decision of the Circuit Court of Appeals, 254 U. S. at page 13:

> "It was also argued that the parties made an express agreement that the Coal Company should have a lien; that is, that they created by agreement a non-statutory lien. The concurrent findings of fact by the lower courts, which we accept (*Baker* v. *Schofield*, 243 U. S. 114, 118; *La Bourgogne*, 210 U. S. 95, 114; *The Germanic*, 196 U. S. 589, 595); are to the contrary".

In the instant case we argued that the parties contracted that the Coal Company should not have a lien.

It is submitted, therefore, that the situation in principle is the same in this case as it was in the case just discussed and that the same rule should be applied.

In *Case Manufacturing Co.* v. *Soxman*, 138 U. S. 431, the question was whether the Court erred in finding that the notes of a limited liability company were accepted as payment and satisfaction of the original liability under the contract. The Court said, at page 439:

> "Here we face the proposition that we are not triers of fact. And if there were evidence upon which such a finding might properly rest, we should accept the finding as conclusive, and inquire no further into the testimony than we should into its sufficiency to sustain the verdict of a jury. * * * It is enough to affirm that there is in these matters testimony from which such a conclusion might be drawn; and, therefore, the findings of the trial court in this respect cannot by this court be ignored."

The findings below were well founded.

Indeed, this is not a case in which appreciation of the facts tends to discredit the findings of the lower courts or to reflect unfavorably on the principles on which the findings were based.

It is worth noting again that in this case the only witness called and who testified orally before the District Judge was a witness on behalf of the libelant, and that thus the findings of the Courts below really meant that the Coal Company by its own evidence accompanied by contracts and other written exhibits proved that it did not give credit to

the ship but gave credit to the endorsers *as primary obligors*, and thus waived the maritime lien which would have risen in the case of an order for coal followed by a delivery.

The contract was the principal matter indicative of the intention of the seller not to rely on the credit of the ship.

The contract was clear and its terms consistent. The contract stated that it expressed the whole of the intentions of the parties and there was nothing to suggest that it did not do so.

The seller was aware of the existence of a maritime lien in ordinary course for the sale of coal to a vessel, but did not mention the lien in the contract but expressly declared that there was no outside agreement or understanding. The seller testified that he would not have sold the coal merely on the credit of the vessel and the owner; he required trade acceptances *with named endorsers as primary obligors*. And the terms in which he required the trade acceptances disclose no intention to rely on the credit of the ship. When it is recalled that the only conclusion that need be drawn from these facts is that the seller did not rely on the credit of the vessel, the findings of the lower courts seem unquestionable. *Ely* v. *Murray & Tregurtha*, 200 Fed. 368, 371 (C. C. A. 1). *The Bronx*, 246 Fed. 809, 810 (C. C. A. 2).

In considering these findings it must be borne in mind that the opinion of the parties as to the legal significance of their acts is without legal effect. *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 10.

Even if there were some evidence of an intention on the part of the seller to retain the lien, it is doubtful, whether such intention could be enforced as against "the plain sense of the binding words of the agreement" *A. Leschen & Sons Rope Co.* v. *Mayflower G. M. & R. Co.*, 173 Fed. 855, 857.

It is what parties do, not what they intend to do or what they think they are doing, which determines legal rights.

Similar situations have been similarly treated.

The construction of the situation in this case by the Courts below is absolutely in accordance with the construction of a similar situation in *Phelps* v. *The Camilla*, Taney 400, 19 Fed. Cas. 441, 444, the libelants, Phelps Dodge & Company, had furnished copper for repairing the bottom of the brig *Camilla* at New York City, which was not her home port. The copper was ordered by her owners' agents, Smith & Town, was billed to them originally and paid for by their negotiable six months note, which was not met owing to insolvency of Smith & Town.

When Phelps Dodge & Company sued the *Camilla* at Baltimore claiming a maritime lien, Chief Justice Taney, after discussing the facts and several possible grounds of decision, said, 19 Fed. Cas. at page 445:

> "It must not, however, be understood, that the decision would be different, if the copper had been originally charged to the Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig: but that lien, in my opinion, would have been waived by taking afterwards the note of Smith & Town. This is the doctrine recognized in The Nestor (Case No. 10, 126), and in the case of Murray v. Lazarus (*id.* 9,962), where the material men had agreed with the master to take a bill of exchange on the agents of the owners, the court held that it was a waiver of the lien.

"In the last-mentioned case, the court said: 'If this is to be considered a regular and ordinary bill of exchange, it was a satisfaction for any lien that might have existed, and must be considered as a relinquishment thereof'. The same may be said of the note given by Smith & Town in this case, even if the account in the books of Phelps, Dodge & Co. is corrected in the manner stated in the testimony of James. If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue."

In *Taylor* v. *The Commonwealth*, 14 Am. Law Reg. (N. S.) 86, 23 Fed. Cas. 756, Mr. Justice Miller while sitting on Circuit said at page 757:

"I have no hesitation in saying myself, therefore, that the rule of allowing a lien for these repairs ought to be extended to a vessel in a home port, as well as to a vessel in a foreign port, and that this vessel, and this work and labor, are of a character which, in my opinion, probably constitute such a lien, if the parties had permitted it to rest on the implied results of the work and labor done under such circumstances. But, unfortunately, they did not. They entered into a specified contract for this work. There is no doubt about that contract, although some little doubt is expressed as to the precise reliance placed upon it

by Mr. Taylor. The contract itself, I think, shows for itself what he did rely on, and that is the trouble in this case. Before the vessel was docked, and before any work was done on her, they made a specific agreement, which was reduced to writing, not signed by the parties, but a memorandum made by the agent of the wrecking company, and that agreement is this: That if the repairs did not exceed $10,000, they were to be paid for one-half in cash, and the balance in an endorsed note; if they exceeded $10,000 they were to be paid one-third in cash and the balance in endorsed notes, payable, I think, in thirty, sixty and ninety days. As to what 'endorsed notes' meant, there is no controversy. It meant personal security. Now, the contract was: 'That for this work I am going to do for you, you are to pay me a considerable portion in cash, as the work progresses, or before you get the vessel and at the end of it you are to pay me the balance in good negotiable notes, with proper and sufficient security.' I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel, and under some circumstances against the master; but that is a lien which the law implies from the circumstances, and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. It is very clear to me, here, that Captain Taylor, in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. What better payment can a man have than secured papers? And what is the use of his relying on the vessel as security when he says: 'Before you get this vessel out of my hands, you are to pay me one-half cash, and the balance in endorsed notes with good security.'

"I think, having made an express contract for an express security, he cannot say, 'I did this work on the credit of the vessel.' In other words, I think if there is any question of admiralty lien, a lien for supplies and repairs, that it must have been the intention in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel; and although in a foreign port (and I suppose the same thing would apply here when the supplies and repairs are necessary, and nothing is said to the contrary), the law presumes a reliance on the vessel, yet it is only a presumption. But it is said that in foreign ports such is the presumption, because the man who furnishes the supplies is not there and may not know anything of the owner. If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the fact expressed or implied that the man in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien. I am sorry for this result, because it seems this corporation is a mere sham, and whether any party belonging to it may be individually liable or not, I do not know. But the result of it is that this decree must be reversed."

In the case of *Murray* v. *Lazarus* (C. C. S. D. N. Y., 1826), 1 Paine 572; Fed. Cas. 9962, a vessel was bound from New Orleans to New York, but was compelled to put into Wilmington to refit. Circuit Justice Thompson, in deciding the case, found that there was a special agreement between the master of the ship and the respondents

for the payment of the advances which they made to enable the ship to obtain repairs. The respondents took from the master a bill of exchange for that amount and Circuit Justice Thompson, in holding that the lien had been waived, said in words which are particularly applicable to the present case (Italics ours):

> "The case is not open for the inquiry, whether, by the general maritime law, every contract made by the master for repairs and supplies for his ship whilst on a foreign voyage, does not import an hypothecation. *When an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien, if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others.*"

To the same effect are the views expressed in the opinion of Mr. Justice Woodbury on Circuit in *Leland* v. *Medora*, 2 Woodb. & M. 92, 15 Fed. Cas. 298, 301.

Mr. Justice Story sitting on Circuit in *The Nestor*, 18 Fed. Cas. 9, said:

> "So if the nature of the contract excludes the implication that the parties intended any lien the same result follows: for it is competent for parties to waive a benefit of this sort."

The holdings below give full effect to lien provisions of the Merchant Marine Act of 1920.

The petition for certiorari rightly states the rules enacted by the Merchant Marine Acts.

It states the rules to be "the burden of proving that supplier did not rely upon the credit of the vessel is now upon the claimant" or in other words that the lien "is presumed on proof of due delivery • • • until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment".

But the petition does not state that those rules were not observed.

The petition does not deny that the lower courts placed the burden of proof on the buyer to show that the seller did not rely on the credit of the ship. He did not in his assignment of errors declare that the district court failed properly to place the burden of proof.

That the Circuit Court of Appeals did place the burden of proof on the buyer is apparent from its opinion, particularly the language

> "nothing in this Act bars proof that whatever was furnished was furnished on the mere credit of the owner or third party and in no sense upon the credit of the ship." (*R.* 32.)

That both lower courts found that the buyer had successfully borne the burden and established that credit was given to the ship is pointed out above. (*Ante*, pp. 14-16.)

The petition for certiorari then states:

> "In the instant case, there was no affirmative proof of the agreement that the principal party was to be exclusively liable for payment" and it is declared that "such finding is not well founded."

Obviously this is a dispute as to facts and does not state any principle beyond those already discussed.

It may be pointed out here that the dissenting opinion below does not state a different rule from that applied by the majority but merely declares that the Act requires that the claimant must show that the lien was released or waived and that "the proof falls far short of that." (*R.* 36.)

Neither the dissenting opinion nor the petition states any principle or rule growing out of the Act which the lower courts did not observe.

Finally, the petition states that the Merchant Marine Acts were nullified because "the lower court held that, although there was no specific agreement to waive the lien and no estoppel but merely because the supplier had by agreement some security beyond the vessel he did not rely on the credit of the vessel as well".

In this connection it should be pointed out that the dissenting opinion below said "the claimant must affirmatively show, there being no agreement and no estoppel, that the parties could not have intended both securities to stand together" (R. 36).

The quoted language does not state any legal principle or rule as to the burden of proof other than that already discussed.

The language does not say that the court did not properly place the burden of proof but merely disagrees with the conclusion as to whether the party intended to rely on the credit of the vessel. But the language does not even state correctly what the courts below did hold.

As has been pointed out before, they held that the parties agreed that the trade acceptances should constitute sole payment, and that the seller did not rely on the credit of the ship. Both of these statements in the dissent and on the petition are based on the assumption that there was no contract. But if the lower courts did hold as the peti-

tion alleges, it would only be a holding on facts as to whether the seller intended to retain a lien.

There is no question as to the application of the Merchant Marine Acts at this day. They have been often before this Court and before the lower federal courts.

The petition for certiorari does not allege that the decision below conflicts with any applicable decisions relative to the construction of the Merchant Marine Acts.

The effect of the Act, at least as applicable to this case, was to remove the presumption that existed that the seller of goods to a vessel in her home port relied on the credit of the owner and replaced it with a presumption that he relied on the credit of the ship, or, in other words, it removed from the seller the burden of proving that he contracted for his lien and placed the burden on the buyer to show that a lien was not contemplated or that it was waived.

The Act put the supplier in a home port in the same situation as the supplier in a foreign port. There is no change in the substantive law as to maritime liens, but merely as to the manner in which such lien shall be established at trial.

The Act does not declare what constitutes waiver. By the Act the waiver of a maritime lien may be by "agreement or otherwise." *If the Act may be said to enter into the field of maritime liens where there is evidence of the intentions of the parties or a contract, it cannot be held to require waiver in any set form or in any particular words, but leaves the finding of such waiver subject to existing rules affecting the creation of maritime liens. Waiver is just what it previously was.*

Nothing in the Act or in the intention of the legislators is shown which purports to affect the former rule that any-

thing inconsistent with the existence of a lien may constitute waiver.

The Act does not require the parties to contract for a lien; nor can it be said to specify the manner in which to waive a lien. The existence of a lien is made an incident to the ordinary transaction of sale to a vessel, and can be altered like any other incident by the agreement of the parties.

The question is merely whether the evidence preponderates in favor of an agreement that the implied usual terms of the transaction shall be superseded by a special agreement in this particular case.

The maritime lien is still given by implication of law and is not to be implied as against evidence indicative of a contrary purpose. The presumption of a lien created by the Act disappears when evidence is admitted, for it is no longer of any use. Cf. Story, J., in *The Nestor*, 18 Fed. Cas. 9, 14.

The Act does not declare what inferences are to be drawn from specific evidence beyond the mere evidence of sale to a ship.

The lien is still stricti juris. Its purpose is to enable the ship to move freely and not to protect the seller. The only reason that the lien is given is that the vessel could not secure goods unless the lien were given because the seller would not furnish them. That is the reason why no lien exists where it is shown the seller did not rely on the credit of the ship.

The decisions of this Court under the Merchant Marine Act.

And the applicable decisions of this court are free from the suggestion of any rules or principles further than those above declared to be established by the Merchant Marine Acts.

In *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, the legislative purpose motivating the enactment of those laws was stated at page 11 to be *first*, "To do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or State, but denied where the supplies were furnished in a home port or state. *The General Smith*, 4 Wheat, 438"; *second*, "To do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely on the vessel and that hence no lien arises. *The St. Jago de Cuba*, 9 Wheat. 409"; *third*, "To substitute a single Federal statute for the State statutes insofar as it conferred liens for repairs, supplies and other necessaries. *Peyroux* v. *Howard*, 7 Pet. 324".

And it was further said, on page 11, "The reports expressly declared that the bill makes '*no change in the general principles of the present law of maritime liens*, but merely substitutes a single statute for the conflicting state statutes.' "

In that case this Court held, page 13, that maritime liens were *stricti juris* and could not be extended by construction, and that as the goods were not furnished to the vessels, liens could not be maintained against them.

In *New Bedford Co.* v. *Purdy*, 258 U. S. 96, 100, the court reasserted the limited purposes of the Act and declared that it did not change or extend the rules as to what was construction or repairs. That decision approved of the statement that the Act made no change in the general principles of the present law of maritime liens.

Again, in *United States* v. *Carver*, 260 U. S. 482, it was said, at 488:

> "The Act of 1910, by which the transactions with the *Clio* were governed, after enlarging the right to a maritime lien and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualifies the whole in Sec. 3 as follows: • • • We regard these words as too plain for argument. They do not allow the materialman to rest upon presumptions until he is put upon inquiry, they call upon to inquire."

And, in *Morse Dry Dock Co.* v. *Northern Star*, 271 U. S. 552, it was said, at 554:

> "The only importance of the statute was to get rid of the necessity for a special contract or evidence that credit was given to the vessel."

In that case the question considered was whether the master had authority to bind the vessel.

As late as *Plamals* v. *Pinar Del Rio*, 277 U. S. 151, the rule of strict construction as to the existence of maritime liens is reaffirmed.

Decisions of the lower Federal Courts.

When one considers Judge Learned Hand's dissenting opinion it is perfectly clear that in his view there cannot be

any waiver of the right to a maritime lien in the case of supplies furnished to a vessel unless that waiver is explicitly made by the contract.

The Court should bear in mind the statute under which maritime liens are based is not narrowed in this way. The Statute provides that the right to a lien may be waived at any time "by agreement or *otherwise*".

The construction which Judge Hand has put on the statute eliminates the word "*otherwise*" entirely and makes it impossible, in his opinion, to establish a waiver of the right to a lien by any implication no matter how strong.

In this attitude he is not supported by the authorities which have always recognized waiver by implication.

The decisions of the lower courts uniformly place on the buyer the burden of proving that the sale was not on the credit of the vessel and then proceed to examine all the circumstances to determine the intention of the party, and in some the intention is found to rely on the credit of the vessel and in others such intention is not found. None of these cases established any principles in respect of the finding of such intention different from those applied in the instant case.

The decisions of the Circuit Court of Appeals agree as to the effect of the Acts. In *Ely* v. *Murray & Tregurtha Co.*, 200 Fed. 368, 371, the Circuit Court of Appeals for the First Circuit stated the same rule as that applied in the Court below. That opinion declares:

> "The engine was installed in the home port of the owner; but under the statute cited, this is no longer a matter of importance. Beyond that, all the statute requires is that whatever was furnished should have been furnished on the order 'of the

> owner' and it also provides that, in order that a lien therefor may be enforced in rem, 'it shall not be necessary to allege or prove that credit was given to the vessel.' Of course, this does not bar proof that whatever was furnished was furnished on the mere credit of the owner, and in no sense on the credit of the vessel; but it meets the presumption that there is no lien for materials furnished on the order of the owner, as there is a presumption in favor of a lien when the articles are ordered by the master under appropriate circumstances."

This rule was applied later in the same circuit in *Robins Drydock & Repair Co.* v. *Chesbrough*, 216 Fed. 121. In that case a note was given but the Court held from the circumstances that there was a mortgage and that there was nothing in the case which tended to show that the original debt was merged.

In the Second Circuit the rule was stated in the following language in *The Bronx*, 246 Fed. 809, 810:

> "The lien is presumed on proof of due delivery on request of lawful supplies, until such presumption is destroyed by affirmative proof of agreement that the promising party was to be exclusively liable for payment." Citing *The Havana*, 64 Fed. 496; *The Yankee*, 233 Fed. 919; *The Oceana*, 244 Fed. 80.

The same principle as to the application of this Section of the Act was recognized also in *West Kentucky Coal Co.* v. *Dillman*, 15 Fed. (2d) 25 (C. C. A. 8).

There are many district court cases touching on the creation of maritime liens under the Merchant Marine Acts, but, of course, none of them establish principles beyond those declared by this Court and by the Circuit Courts of

Appeals. In some of the cases on the facts the lien is found, in others it is found to be waived.

It is of interest that the case nearest to the one under consideration as to facts was decided in the same fashion and with the same result.

In *The Defiance*, 3 F. (2d) 48, various claims were made against the proceeds of the sale of the vessel, among them a lien was claimed for a marine engine furnished to the vessel. The vessel was mortgaged to a bank. The master desirous of purchasing the engine from the libelant endeavored to arrange with the bank for credit but failed. The libelant sold the engine under an agreement which provided payment partly in cash and the balance in twelve notes. The wife, the owner of the vessel, joined in the contract. Title remained with the libelant until final payment. The contract contained a clause similar to that in the instant case, that there were no understandings or agreement other than expressed therein. The case for the suppliers was stronger than in this case, for when the notes were given they contained a clause that the acceptance of the notes did not waive any maritime lien which the suppliers had. There was also some evidence that the seller intended to rely on its maritime lien for protection, but the Court held on the facts that the engine was not sold on the credit of the vessel and disallowed the lien claimed. Judge Groner said, at page 51:

> "The effect of the statute avoids the necessity of proof that credit was given to the vessel. It does not, however, bar proof that the supplies or equipment were furnished on the credit of the owner alone, and it cannot be doubted that in the latter case no lien exists. If this be correct, it would follow, necessarily, that a decision of the question depends upon the facts."

> "Since, therefore, the parties, by their own solemn contract in writing, have declared the whole agreement to be a sale on the part of the one to the other with a reservation of title, and an agreement on the part of the other to pay the balance of the purchase price in monthly installments, and have likewise declared that no verbal understanding or agreement should modify these terms, it seems to me it would be a far stretch of a law to hold that this was a sale on the credit of the vessel; nor in my opinion is this conclusion shaken by the printed stipulation contained on the face of the notes evidencing the deferred payments, for in itself it is no more than a claim of reservation of a lien on an unnamed vessel if the law should give it."

Alleged conflicts with Circuit Courts of Appeal.

The petitioner contends that the instant decision is in conflict with *R. R. Ricou & Sons Co.* v. *Fairbanks, Morse & Co.*, 11 F. (2d) 103. This is not correct.

In that case, it was argued before the appellate court, for the first time, that the libel failed to establish the existence of a maritime lien on the ground that it appeared that the seller retained title to the property. Relative to this challenge, the Court said, page 104:

> "But the libel as a whole was not subject to objection on that ground, because its allegations showed that appellee, upon the order of the boat's owner, furnished to it labor and material the title to which was not shown to have been retained by the appellee."

After thus disposing of the question the Court proceeded to hold that the retention by contract of title as security

was not inconsistent with the existence of the lien. For this reason, the decision is cited to hold that the seller need not allege or prove that he sold the goods on the credit of the vessel. It must be recalled that the decision was on exceptions—equivalent to a demurrer—to the libel and before trial. It does not appear from the opinion that the contract itself was before the Court. The rule laid down by the Court then merely was that the burden of proving the seller did not rely on the credit of the ship is on the buyer. The same rule was applied by the lower courts in this case.

Assuming (but not conceding), as Judge Learned Hand said in his dissent, that the shipowner must prove affirmatively that—

> "the parties could not have intended both securities to stand together." (*R.* 36.)

we submit that the record shows just that:

It shows it as follows:

1. By the agreements themselves (*R.* 14-18).

2. By the fact that the Coal Company "didn't believe that the * * * Line was financially responsible" (*R.* 12).

3. By the fact that the Coal Company "didn't like the account and wanted to get trade acceptances * * * to discount" (*R.* 9).

4. By the fact that although the Coal Company filed its libel, it did not rely thereon but subsequently took an entirely different and inconsistent position in respect of its claim, to-wit, it commenced an action in the Supreme Court of the State of New York against the endorsers—the primary obligors—and sought to secure judgment on the acceptances (*R.* 12).

5. By the fact that in that action in the New York Supreme Court the Coal Company took the position that the endorsers were the primary obligors (*R.* 22-24).

Judge Learned Hand says that "the law looks to the essence" (*R.* 35). That is what we contend, and we say that, examining the record and harmonizing all its elements, the essence of the transaction was that the Coal Company was relying upon the endorsers as primary obligors and not upon the Shipowner and, hence, not upon a maritime lien on the *President Arthur*.

Since the findings of the lower courts are amply supported by the evidence and since the principles applied have long been established by this Court the decree below should be affirmed.

In the instant case, it is submitted, therefore, there was a clear waiver of the right to a lien.

SECOND POINT.

EVEN IF A MARITIME LIEN WAS CREATED BY THE DELIVERY OF THE COAL IT WAS EXTINGUISHED BY THE PAYMENT MADE IN ACCORDANCE WITH THE PROVISIONS OF THE CONTRACT OF SALE, NAMELY: BY THE DELIVERY TO THE COAL COMPANY OF THE DULY ENDORSED TRADE ACCEPTANCES.

The contracts both provided that "*the buyer shall pay for the said coal as follows*"; then followed the details as to the trade acceptances by which the payment was to be made, and which were delivered to the Coal Company in pursuance to the terms of the contracts.

Judge Manton, in the opinion for the Court below, said, *R.* 33:

> "Where parties agree to an express contract as payment, the contract becomes extinguished by full performance and so it is impossible that either party should have any claim against the other arising out of the contract. No lien can exist in favor of the materialman when he receives in payment that for which he stipulated when the contract was made."

This is strictly in accordance with the principles repeatedly laid down by this Court.

In *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, Justice Brandeis said, at page 149:

> "Whether the transfer of money or other thing shall operate as payment, is ordinarily a matter which is determined by the intention of the parties to the transaction."

and in that case loans by an insurance company to the insured were held not to constitute payment because by the agreement between the insurer and the insured they were mere loans.

In *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66, at 98, the Court held that the taking of warrants by a state in accordance with the terms of the contract made the transaction finished and completed and that

> "Neither party as between themselves can thereafter act as if the contract had not been performed."

In *Hubbard* v. *Investment Co.*, 119 U. S. 696, 701, 702, recovery for services as broker was claimed on the common counts for work and labor done, but it was held that no such recovery could be had

> "Because it clearly appeared that whatever was done by the plaintiff in that behalf was done under

the special written contract, and not upon any implied contract for compensation."

In *Case Manufacturing Co.* v. *Soxman*, 138 U. S. 431, 438, the question was whether the court erred in finding that the notes of a limited liability company were accepted as payment and satisfaction of the original liability under the contract. One of the notes had been discounted. The Court said at page 438:

> "Supposing this first note discounted by the plaintiff had been paid by the Milling Company, could the plaintiff then be heard to say that these notes were not received in payment? While, in fact, it was not paid, yet the plaintiff treated it as its property and negotiated it. Can it now be heard to say that such note was simply evidence of the amount due, when it received and used as its property? It is unnecessary to affirm that these matters show conclusively that the obligations assumed by the original contract were satisfied and discharged by the settlement and notes * * *."

In *Segrist* v. *Crabtree*, 131 U. S. 287, one of questions considered was whether notes were received as actual payment or only as evidence of the amount to be paid. In that case there was an agreement that notes were to be given for the purchase price of cattle. The Court approved the charge to the jury which stated that as the sale was unconditional and as the notes were given and accepted as absolute payment, the original debt was extinguished and the remedy of the defendant was on the notes. And it was said the question as to whether the notes were given and accepted in payment of the cattle was fairly left to the jury.

In *Hendrick* v. *Lindsay* (1876), 93 U. S. 143, the Court said at page 149:

> "• • • but negotiable promissory notes are equivalent to the payment of money, if received by the creditor in satisfaction • • •."

In *Lyman* v. *Bank of the United States*, 12 How. 225, 243, it was held that the question whether there was an agreement at the time to receive notes in satisfaction of the debt or whether the circumstances attending the transaction warranted such inference were properly questions for the jury.

Chief Justice Marshall in *Sheehy* v. *Mandeville*, 6 Cranch 253, said, at page 264 (italics ours):

> "That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. *But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties, or a third person, may, by agreement, be received in payment.* • • • Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods."

Although criticized in *Mason* v. *Eldred*, 6 Wall. 231, at pages 238-239, as to another point decided, the principles laid down in the above quotations have not, we believe, ever been questioned.

A case which is in principle a perfect analogy to the instant case is *Central Trust Company* v. *Richmond, N., I. & B. R. Co.* (C. C. A., 1895), 68 Fed. 90; certiorari denied, 163 U. S. 679.

In that case, a contract had been made between the parties, by which one company agreed to construct a railroad and to receive payment therefor in bonds. These bonds were given in part, and the question was whether the construction company had a mechanic's lien for the work done by it. In deciding the case, Judge Lurton, afterwards a Justice of this Court, said at page 94:

> "It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien."

To the same effect is:

> *Ohio Falls, etc. Co.* v. *Central Trust Co.* (C. C. A. 6, 1895), 71 Fed. 916.

Finally, the same principle has been approved and settled by the decision of this Court in the case of *McMurray* v. *Brown*, 91 U. S. 257. In that case a contractor contracted to furnish materials and construct a building, and to receive payment in part in cash, in part by the conveyance of a specified piece of real estate and in part in promissory notes. The Court held that the contractor was entitled to his lien on the refusal of the owner of the lot to convey it, or in lieu thereof, to pay for the material used in the construction of the building. Mr. Justice Clifford delivered the opinion of the Court and said at pages 265 to 266 (italics ours):

> *"Cases may arise, undoubtedly, where the rights and responsibilities of the parties are so completely*

> ***defined by the contract, that neither party is at liberty to claim any thing beyond the terms of the contract, if the contract is in all respects fulfilled.*** Consequently, lien laws do not in general create a lien in favor of a material-man who has accepted in full a different security at the time the contract or agreement was made * * *."

It is the settled law that when a note of a third party, or what is equivalent thereto, a note endorsed by a third party, is to be given as part of the payment of the consideration under an original agreement for goods or services, the note itself is the payment called for. And when that is given there ceases to be any claim under the original agreement, which has been fully performed (as to such feature), by the giving of the note.

Taylor v. *The Commonwealth*, Fed. Cas. No. 13,787;

Youngs v. *Stahelin*, 34 N. Y. 258, 265 (cited with approval by the C. C. A. for the 2nd Circuit in *Atlas* v. *Columbian*, 102 Fed. 360);

Whitbeck v. *Van Ness*, 11 Johns (N. Y.), 409, 409, 412, 414, 415;

Phelps v. *Camilla*, Taney's cases, 400;

Murray v. *Lazarus*, 1 Paine 572, 577;

Noel v. *Murray*, 13 N. Y. 167, 171, 172;

Manning v. *Lyon*, 70 Hun. 345;

Segrist v. *Crabtree*, 131 U. S. 287, 289;

Sheehy v. *Mandeville*, 10 U. S. (6 Cranch), 253, 264.

Decisions of this Court relied on by Petitioner.

The petitioner relies in its brief on three cases:

> *The Kimball*, 3 Wall. 37, 45;
> *The Bird of Paradise*, 5 Wall. 545, 561;
> *The Emily Souder*, 17 Wall. 666, 670, Petitioner's brief, pp. 8-9.

These cases are all distinguishable from the case at bar.

In *The Kimball*, 3 Wall. 37, a note had been given but there was no contract and the note was given for a pre-existing debt. The lien in that case was for freight. That was a type of lien favored by the Court. It was found there was nothing in the charter party there considered inconsistent with the intention to retain the lien. The language of the opinion quoted at page 8 of the petitioner's brief recognizes in the italicized part of the quotation that a promissory note will discharge a debt if "*such be the express agreement of the parties.*"

The Circuit Court of Appeals adequately discloses the distinction between the present case and *The Bird of Paradise*, 5 Wall. 545.

Judge Manton said (R. 33):

> "In *The Bird of Paradise*, 5 Wall. 545, 18 L. Ed. 662, referred to by appellant, a lien was asserted for freight. That lien differs from a maritime lien for repairs because a ship is bound to the cargo until delivery or tender of delivery and equally is the cargo bound to the ship for the payment of freight. The freight contract provided that it should be paid in Liverpool on unloading and right delivery of the cargo. Construing the clauses of the bill of lading together, it was clear that the charterer was not

obliged to pay the freight until tender of delivery. While the charterer did give the first acceptance, he failed in business, and the acceptance was dishonored before the arrival of the ship, and he never gave or tendered the second acceptance mentioned in the charter party. It was held that the lien remained. The Court stated that the freight lien 'stands upon the same ground with the lien of the carrier on land, and arises from the right of the shipowner to retain the possession of the goods until the freight is paid, and is lost by an unconditional delivery to the consignee'. And that the freight lien 'may be modified, or it may be excluded, or displaced by direct words, or by the insertion of some stipulation wholly incompatible or irreconcilable with the existence of such a right.' Requiring the appellee to procure indorsements of three separate individuals was such a stipulation as is referred to in the language quoted, and the appellant relied solely upon the indorsements and not on the maritime lien, for it refused to sell until it had the agreed indorsements."

The facts in *The Emily Souder*, 17 Wall. 666, were as follows:

A steamer was compelled to put into a small South American port for repairs. Her captain was without funds or credit. Her owners were unknown there and also without credit. The captain and the United States consul had to apply to several firms before finding one willing to furnish supplies, repairs and other necessaries needed and to advance necessary funds. Thirty day drafts on the owners for the price of the necessaries and advances were given by the captain. These were accepted by the owners but later dishonored. The creditor interests claimed a lien on the ship.

The libellants asserted that the advances "were made on the credit of the vessel, and would not have been made on any other condition; but that the drafts were taken only as conditional payment, and not in satisfaction of the sums advanced."

The captain testified that the advances were made on the credit of the owners of the vessel and upon drafts on them, nothing being said at the time about bottomry on the vessel or raising any money on her credit.

This Court in its opinion recognized the rule applied by the Circuit Court of Appeals in the instant case.

Mr. Justice Field said, 7 Wall at page 670 (Italics ours):

> "The drafts given by the captain upon the owners of the vessel in New York were not received by the libelants in discharge and satisfaction of the sums advanced. They were received only as conditional payment. Such would be the presumption of the law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment: it is treated everywhere, *in the absence of express agreement or local* usage to the contrary, as conditional payment only. On principle, nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent."

After adverting to the rule that there was presumptively a lien on a vessel for supplies furnished in a foreign port, the Court in that case as the Court did in the instant case, examined the circumstances in order to ascertain the intentions of the parties. There was no express contract in the Souder case made by the owners indicative of their intention, and the fact that the Court was unable to find

from the mere circumstance that the captain gave and the suppliers accepted drafts on the owner, an intention to waive the right to a lien does not conflict in any way with the decision below which held on the facts that the lien was waived.

The Court in the *Emily Souder* found the evidence direct and positive that the drafts were taken as conditional payment only.

In this case the contract was found to be direct and positive that the drafts were to be taken as absolute payment. The absence of an agreement with the owner in the Souder case alone constitutes a significant distinction.

The decision in the instant case below, therefore does not present any rule contrary to the applicable decisions of this Court relative to the effect of an agreement to take a note in payment for goods.

Indeed the decision in the instant case is entirely in accord with the long line of decisions in this Court above mentioned on this question.

Alleged conflicts with Circuit Courts of Appeal.

The petitioner's brief concludes with allegations of conflicts with certain decisions of other Circuit Courts of Appeal. In what respects the conflicts exist is not clearly stated.

Inasmuch as the only question presented by the decision below is a question of fact, it is difficult to see how it can conflict with applicable decisions of other Circuit Courts of Appeal on matters of law.

The first conflict is declared to be with the decision of the Circuit Court of Appeals of the Eighth Circuit in *A.*

Leschen & Sons Rope Co. v. *Mayflower G. M. & R. Co.*, 173 Fed. 855. In that case a mining company purchased rope on a conditional sale contract which recited "to be paid for by your note". The mining company gave the note and later defaulted in payment. The rope company repudiated the note and replevied the rope. The mining company contended that the giving of the note constituted payment.

That opinion exhaustively sets forth the principles necessarily to be regarded in the construction of a contract wherein there are conflicting terms. Many of the principles stated in that opinion are applicable to this case, for in this case as in that the intention of the parties controls. That opinion emphasizes necessity of determining such cases on the facts. The opinion clearly declares that, even as to a mechanic's lien, the existence of the lien depends on the intention of the parties as expressed in the contract and as shown by the circumstances of the case.

Why the Court found differently in that case is apparent from a glance at the facts. In that case a purpose to retain the lien was evidenced from the outset by retention of title in the conditional sale contract. That provision of the contract alone was evidence of intention sufficient to counter-balance the provision that the note should constitute payment. The terms of the contract were inconsistent. The lower courts in our case pursued the same steps as the Court in the Eighth Circuit but found that there was no scrap of evidence that the parties intended to retain the lien. The Circuit Court of Appeals for the Eighth Circuit recognized that it was dealing with a contract of inconsistent terms. Here the terms of the contract are clear and uncontroverted by any evidence. The binding effect of clear terms of contracts such as the one here considered is remarked in that decision. The opinion declares (p. 857):

> "The intention of the parties, when manifest, or when ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or the dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

If, as the petitioner contends, it is unreasonable to find that he did not rely on the credit of the ship, that intention cannot be enforced because directly contrary to the plain sense of the binding words of the agreement. Certainly the petitioner cannot contend that there is anything in the contract indicative of an intention to retain the lien.

The next decision alleged to be in conflict is *El Amigo*, 285 Fed. 868. There the City of Houston had taken a bond from one Miller, who operated a string of vessels, conditioned on the payment of all charges accruing in favor of the City from the ships operated by him. Subsequently certain charges accrued to the City and it claimed a maritime lien. The Court found "the terms of the bond do not indicate that the acceptance of it was intended to have the effect of waiving, releasing or discharging any lien the City might acquire. There was no evidence that the City consented to give up its lien or that the bond was accepted in lieu of claims which might arise in the City's favor for wharfage, etc." The bond was a general bond required of all persons contracting with the City. There was no contract indicative of the intention of parties. The bond was not payment itself, in fact it was conditioned on the failure of payment in the ordinary course. The difference in facts between that case and the instant case explains the difference in the findings of the two courts. Both applied similar principles and gave the same effect to the Merchant Marine Act.

Under the facts as shown here and in view of these authorities, it is submitted, that there was not any maritime lien on the S.S. *President Arthur*, on which a proceeding *in rem* must be based, because the libellant had been paid in full in accordance with his contract.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED WITH COSTS TO THE RESPONDENT.

Respectfully submitted,

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New York, February, 1929.